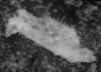
In the

Supreme Court of the United States.

October Term A. D. 1900.



THE DANVILLE WATER COMPANY,

vs.

CITY OF DANVILLE,

Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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THE DANVILLE WATER COMPANY *vs.* CITY OF DANVILLE.	Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

JOHN H. LEWMAN,
City Attorney,

GEORGE F. REARICK,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

In the Circuit Court of Vermilion County, Illinois, the Danville Water Company filed its declaration in an action in assumpsit against the City of Danville, to recover for the rental of one hundred and fifty-eight fire hydrants, for a period of three months from May 1st, 1895, to August 1st, 1895.

The declaration consists of a single count, and in it certain ordinances are set forth *in hæc verba*, passed at various times from Nov. 11th, 1882, to Oct 18th, 1894, in and by which the Water Company claim that the city contracted to pay for said hydrants certain rentals at various rates, aggregating for said period the sum of $2,620.62.

To this declaration two pleas are interposed by the city, which profess to answer only, as to all claimed in the declaration, except $1,930, parcel, etc.

The final action of the lower courts of which the Danville Water Company complains, is that it was held below, that these pleas were good as to what they professed to answer, and that the judgment in its favor was for but $1,930, when it should have been for $2,620.62.

The pleas were demurred to, the demurrer was overruled, and plaintiff in error excepted, and stood by its demurrer, and judgment passed accordingly for $1,930, the amount confessed by the pleas.

An appeal being perfected to the Supreme Court of the State of Illinois, that judgment was affirmed, and it

being now alleged that by this judgment the Supreme Court of the State gave effect to a law and an ordinance which violated the obligation of a contract, and which had the effect of taking the property of the Water Company without due process of law, the case is brought to this court for further review.

A full statement of all the facts is found preceding the decisions of the State Supreme Court, reported in the official reports in the 178 Ill. 299, and 180 Ill. 235.

In the trial court there were originally two cases, differing in no material respect; the only difference being that each covered a different quarter's rental.

In the Supreme Court of the State the two cases were consolidated, and the judgments affirmed, the opinion being found in the 186 Ill. 326. This is the judgment brought to this court for review.

The defense set up by the first and second special pleas is, that the original ordinances set out in the declaration, in so far as they undertook to fix unalterable rates for thirty years were *ultra vires*. That said original rates were, at the time they were fixed, and now still remain exhorbitant and excessive, and exceed a reasonable compensation for the service rendered. That the said City Council of the city of Danville, in view of these facts, on January 19th, 1895, passed an ordinance to take effect May 1st, 1895, by which said hydrant rental was fixed at a different rate, aggregating for said 158 hydrants for said quarter, $1,930. This ordinance is known and designated as Ordinance No. 517, which designation may serve to make more brief the references thereto. That the Water Company was within five days served with a copy of said ordinance, and that an offer was made by the city to enter

its appearance at once in court, if it was desired on the part of the Water Company, to test the question of the reasonableness of the new rate. That said new rate is reasonable and just, and is a fair and reasonable compensation for the service rendered. That said company furnished the water in question with knowledge of all said facts and with due notice. That the said city was authorized by an Act of the General Assembly of the State of Illinois, approved June 6th, 1891, as well as by other competent and legal authority, to pass said Ordinance No. 517.

The demurrer to these pleas is general, and assumes that the laws of the State of Illinois in force at the respective dates of the passage of the ordinances set out in the declaration, authorized the city to pass an ordinance fixing rates for thirty years, and that the city and company had a right under the law to contract for a definite rate, for that length of time; and that the State could not, so long as that alleged contract was in effect, resume its right to legislate on the subject of water rates, as between the city and company.

The plaintiff in error therefore draws the conclusion that the Act of 1891 and Ordinance No. 517 impair the obligations of the several contracts set out in the declaration, and deprive it of the benefits of such contracts without due process of law.

The answer of the defendant in error is that the laws of the State of Illinois did not give the city and Water Company *power* to so contract, and that such alleged contracts are *ultra vires*, and of no binding effect.

The dates of the respective ordinances and the number of hydrants rented, and the rates fixed, as set forth in the declaration are as follows, viz.:

Nov. 11, 1882,	100	hydrants	at	$75.00	$7,500.00
June 7, 1883,	1	"	"	62.50	62.50
Aug. 7, 1884,	2	"	"	"	125.00
April 1, 1885,	4	"	"	"	250.00
June 19, 1890,	5	"	"	"	312.50
Aug. 20, 1890,	3	"	"	"	187.50
	115				$8,437.50
Sept. 3, 1891,	3	"	"	62.50	187.50
Nov. 5, 1891,	1	"	"	"	62.50
Oct. 20, 1892,	2	"	"	"	125.00
" " "	19	"	"	50.00	950.00
June 21, 1894,	12	"	"	40.00	480.00
Oct. 18, 1894,	6	"	"	"	240.00
	158				4)$10.482.50
				Total for 3 months	$2,620.62

One hundred and fifteen of the hydrants were rented by ordinances passed prior to the Act of 1891, and forty-three hydrants subsequent thereto.

Ordinance No. 517 establishes the rates as follows:

For 140 hydrants	at	$50		$7,000.
" 18 "	"	$40		720.
			4)	7,720.
		For the quarter		$1,930.

On the one hundred and fifteen hydrants rented prior to the Act of 1891, all the rates are reduced.

On the forty-three hydrants rented subsequent thereto, a reduction is made on the first six, and the thirty-seven remain as fixed in the ordinances set forth in the declaration.

The City of Danville, it is shown by the pleadings, is a municipal corporation organized under the general laws of the State of Illinois, and the claim that it has power to

contract and fix unalterable rates, as to the first 115 hydrants must be based upon two statutes passed respectively April 9th and 10th, 1872, and which for brevity sake may be referred to as the *Law of 1872*.

As to the remaining forty-three hydrants, the ordinances renting them were passed subsequent to the enactment of the statute of June 6th, 1891, which for brevity will be referred to as the *Law of 1891*, and hence the power to contract as to them must be considered in the light both of the *Law of 1891* and the *Law of 1872*.

The Danville Water Company is a corporation organized under the general laws of that State with reference to corporations, passed April 18th, 1872, which laws contain a reservation to the State, which will be designated as *Sec. 9 of the Corporation Act*.

Leaving out all words not applicable to this case the *Law of 1872* provides as follows:

I.

In all cities where water works may be hereafter constructed by an incorporated company, the city authorities may contract with such incorporated company for a supply of water for public use for a period not exceeding thirty years.

(1 Starr & Curtis Stat. page 865, Sec. 450.)

II.

The City Council shall have the power to provide for a supply of water by the construction and regulation of water works and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.

(1 Starr & Curtis Stat. page 785, Sec. 175.)

The Law of 1891 provides that the corporate authorities of any City in which any corporation has been or hereafter may be authorized by such City to supply water to such cities and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such corporation to such City and the inhabitants thereof, such rates and charges to be just and reasonable.

(1 Starr & Curtis Stat. page 868, Sec. 458.)

Sec. 9 of the Corporation Act provides that, the General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act.

(1 Starr, Curtis Stat. page 1006, Sec. 9.)

The issue of law in this case in the State court was, what under the foregoing statutes, had the City and the Water Company, to contract, on the point of fixing a rate definite and unalterable for a term of thirty years. No other provisions of the ordinances relied on by the Water Company are drawn in question by the City, in this case.

And as we understand counsel for the Water Company, they rest themselves first upon the proposition that said statutes did give power to the City and Water Company to so contract, and secondly that Sec. 9 of the corporation act reserved no right to the State to legislate on the subject of water rates, which could apply in this case.

Plaintiff in error now asks this court to reverse the Supreme Court of the State of Illinois, because the Law of 1891 and Ordinance No. 517 (1) violate the obligations of a contract; (2) take private property without due process of law.

POINTS AND AUTHORITIES.

I.

The Law of 1872 did not warrant a contract by which the rates were to be fixed for thirty years.

Where power is conferred it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to carry into effect the purposes for which it was created.

1 Dillon Mun. Corp., Sec. 443, (4th Ed.)

Any ambiguity or doubt arising out of the terms used by the Legislature in conferring their powers must be resolved in favor of the public. Any fair, reasonable doubt of the existence of the power is resolved against the corporation, and the power is denied.

Seeger vs. Mueller, 133 Ill. 86;
Minturn vs. Larue, 23 How. 435.

It is fundamental that all persons contracting with a municipal corporation must inquire at their peril into the power of the corporation to make the contract.

1 Dillon Mun. Corp. Sec. 447;
Law vs. P., 87 Ill. 385.

No estoppel can ordinarily arise from the act of a municipal corporation done in violation of, or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or misled by acts done without legal authority.

1 Beach Pub. Corp., Sec. 628;
Seeger vs. Mueller, 133 Ill. 86;
Stevens vs. St. Mary's School, 144 Ill. 336.

The city could bind itself only by such contract as it was authorized to make.

Syracuse Water Co. vs. Syracuse, 116 N. Y. 167.

In determining the extent of the power of municipal corporations to make contracts, a careful consideration of the statutes conferring the power is necessary. Where there are express provisions they govern.

1 Dillon Mun. Corp. Sec. 443.

The power claimed to bind the city to a fixed price for thirty years must arise, either from an express grant, or if that does not exist, then such power must be necessary to carry out a power granted. It is not sufficient that such *implied* power is convenient—it should be indispensible.

1 Dillon Mun. Corp. Sec. 89.

Public grants susceptible of two constructions must receive the one most favorable to the public.

Hamilton Gas Lt. Co. vs. Hamilton, 148 U. S. 258.

"The principle is this: That all rights which are asserted against the State must be clearly defined, not raised by inference or presumption, and if the charter is silent about a power, it does not exist."

Black Interpretation of Laws, page 320.

The statutes in question read as follows, omitting words not applicable to this case, viz.:

The Act of April 9, 1872.

That in all cities where water works have been or may

hereafter be constructed by any incorporated company, the city authorities may contract with such incorporated company for a supply of water for public use for a period not exceeding thirty years.

1 Starr & Curtis Stat. page 865, Sec. 450.

The Act of April 10, 1872.

The City Council shall have the power to provide for a supply of water, * * * and to authorize any private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.

1 Starr & Curtis Stat. page 785, Sec. 175.

The Act of June 6, 1891.

That the corporate authorities of any city in which any corporation has been or hereafter may be authorized by such city to supply water to such cities and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such corporation to such city and the inhabitants thereof, such rates and charges to be just and reasonable.

And in case the corporate authorities shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city may be

1 Starr & Curtis Stat. page 868, Sec. 458.

The construction of the Supreme Court of Illinois is that neither of these statutes authorized a contract for a price fixed for thirty years.

Danville Water Co. vs. Danville, 178 Ill. 299;
Same vs. Same, 180 Ill. 235;
Rogers Park Water Co. vs. Fergus, 178 Ill. 571.

Authority to contract does not necessarily imply that the price of the supply shall be fixed for the entire period. The supply could be taken for the entire term, the price to be determined from time to time, and the rates to be settled by the rules of the common law.

Carlyle vs. Carlyle Water Co. 52 Ill. App. 577.

As to whether under the *implied* powers a city may make a time contract for thirty years the authorities are somewhat in conflict.

Some of the cases which hold such contracts void are as follows:

A twenty-five-year water contract.

Brenham vs. Water Co. 67 Tex. 542.

A five-year gas contract.

Richmond Gas Co. vs. Middletown, 59 N. Y. 228.

A ten-year gas contract.

Garrison vs. Chicago, 7 Biss. 486.

A thirty-year gas contract.

E. St. Louis vs. Gas Co.. 98 Ill. 415;
Same vs. Same, 19 Ill. App. 44;
Same vs. Same, 47 Ill. App. 411.

A forty-year water contract.

Des Moines vs. Water Co. 95 Iowa, 357.

A thirty-year water contract.

Flynn vs. Little Falls, 74 Minn. 180.

A twenty-year water contract.

Cartersville Water Co. vs. Cartersville, 89 Ga. 683.

A ten-year water contract between the city and a consumer.

Trustees vs. Jacksonville, 61 Ill. App. 199.

An analysis of the cases cited by plaintiff in error will show that a few of them sustain the position that under an *implied* grant such power exists, but an examination of many of them shows that it affirmatively appears that the contract in question was reasonable.

Take for instance the Little Falls case. The court says: It expressly appears by the evidence that the rates are not unreasonable.

Little Falls Co. vs. Little Falls, 102 Fed. 663.

In other cases the conclusion was under a different statute, as for instance in the Arkansas City case, the grant was of *full power and authority to contract for.*

Ill. Trust Co. vs. Arkansas City, 76 Fed. 271.

The Supreme Court of Minnesota have decided a case very similar in facts to the one at bar. It was alleged that the feature of the contract which bound the city to a fixed rate for thirty years was void, and that the number of hydrants taken was in excess of the present need and the rate exhorbitant, which facts were admitted by demurrer. It was held that this conclusion was right.

Flynn vs. Little Falls, 74 Minn. 180.

In the Federal case that came up under the same law, Judge Lochren seems to stand by the State Court, and distinguishes between the two cases by reason of the fact that in the State case the demurrer admitted that the rates were unreasonable, while in the case before him, the evidence showed directly the reverse.

Little Falls Co. vs. Little Falls, 102 Fed. 663.

II.

To construe these Statutes as enacting that the City and Company could together make a contract which would prohibit the State from exercising its power to legislate on the subject of water rates, would violate the State constitution.

The limitation is that no law, "*making any irrevocable grant of special privileges or immunities shall be passed.*"

Sec. 14, Art. 2, Const. Illinois;
I Starr & Curtis Stat. page 113.

The right to legislate on the subject of water rates is primarily in the Legislature.

In enacting such a statute it clearly acts in its sovereign capacity.

This power of regulation is a power of government, continuing in its nature.

R. R. Commission Cases, 116 U. S. 307, page 325.

Whatever law the Legislature enacts is subject to the above limitation.

The Legislature cannot do indirectly what it cannot do directly.

No legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them. Such a body has no power even by contract to control and embarass its legislative powers and duties.

Cooley's Const. Limitations, page 206.
15 Am. & Eng. Encycl. Law, page 1045;
1 Beach on Pub. Corp. Sec. 554.

On this contention the case of Shields vs. Ohio is directly

in point. The Ohio Constitution contains the same limitation in slightly different language.

The holding of that case is that the Legislature had a right under that constitutional provision to pass a law in 1873 fixing railroad fares at three cents per mile, as against a corporation whose charter gave it the express authority to fix its own rates.

Shields vs. Ohio. 95 U. S. 319.

The debates in the constitutional convention which framed the constitution, show that the framers had in mind the very subject of the regulation of tolls. See particularly the remarks of Mr. Church, on April 30th, 1870, on the amendment offered by Mr. Skinner.

Vol. 2, Debates Const. Conv. 1870, page 1585.

"It is of the highest importance that such control should remain with the State, and it never should be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its powers of taxation."

Covington Turnpike Co. vs. Sandford, 164 U. S. 578, page 587.

III.

Sec. 9 of the Corporation Act reserved to the Legislature of the State of Illinois, full power to enact the Act of 1891, as a regulation on the subject of water rates.

"There is a material difference between an artificial cre-

ation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter."

Shields vs. Ohio, 95 U. S. 319, page 323.

The language of the reservation is as follows:

"The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which rules and regulations shall be binding on any and all corporations formed under the provisions of this Act."

1 Starr & Curtis Stat. page 1006, Sec. 9.

Its charter from the State is in the nature of a contract, and is inviolable except so far as power to change is reserved. This is the doctrine of the Dartmouth College case.

Trust. Dart. College vs. Woodward, 4 Wheat. 518.

The business of supplying water is one impressed with public use or interest, and as such the State has a right to regulate and fix the maximum charges.

29 Am. & Eng. Encycl. Law 11.

and authorities there cited;

Spring Valley Water Works vs. Schottler, 110 U. S. 347.

This power of regulation may extend not only to matters connected with the health and convenience of the public, but also to prevent extortion by unreasonable charges.

Georgia Banking Co. vs. Smith, 128 U. S. 174, page 179.

When the Water Company took out its charter under the laws of the State of Illinois, it contracted with the

State that it would submit to have its business regulated by the State.

This provision in the charter qualified the grant, and the subsequent exercise of the power reserved cannot be regarded as within the prohibition of the Constitution.

Penn. College cases, 13 Wall. 190, page 213;
Miller vs. State, 15 Wall. 478, page 495;
Louisville Water Co. vs. Clark, 143 U. S. 1;
N. Y. & N. E. R. R. vs. Bristol, 151 U. S. 556.

The Water Company took its charter subject to such legislation as the State might thereafter enact, and neither the Company nor the City could make a contract which would abridge this power of regulation.

Sioux City Ry. Co. vs. Sioux City, 138 U. S. 98;
Hamilton Gas Light Co. vs. Hamilton, 146 U. S. 258;
Penn. College Cases, 13 Wall. 190, page 218.

The power of both the City and the Company must be held to be subject to the paramount limitation that the Legislature may exercise its right under the reservation of a power over the business of this corporation, at least in so far as such business is impressed with a public interest or use, and may enact new legislation on the subject of the fixing of water rates.

Persons making contracts with the corporation must take notice of the reserved power of the State. Such contracts cannot vary or in any manner modify the relation between the State and the corporation in respect to the right of the State to exercise the reserved power.

Penn. College Cases, 13 Wall. 190, page 218.

Under this reservation the right to regulate tolls by subsequent legislation exists.

Winchester Turnpike Co. vs. Croxton, Ky. 33 L. R. A. 177;
Zanesville vs. Gas Co. 47 Ohio St. 1;
State vs. Gas Co. 34 Ohio St. 572;
Ga. Banking Co. vs. Smith, 128 U. S. 174;
Peik vs. Ry. Co. 94 U. S. 164.

Such charges may be fixed even when the charter gives the corporation the right to fix its fares and charges

Ruggles vs. P. 91 Ill. 256;
Same, 108 U. S. 526;
Ga. Banking Co. vs. Smith, 128 U. S. 174.

It is but reasonable to hold that this corporation in fixing the rates of its toll shall make them reasonable.

Ruggles vs. P. 91 Ill. 256, page 257;
Blake vs. R. R. 19 Minn. 418;
Ruggles vs. P. 108 U. S. 526.

The constitution of the State of Illinois also contains this limitation that no law "making any irrevocable grant of special privileges or immunities shall be passed."

Sec. 14, Art. 2, Const. of Illinois;
1 Starr & Curtis' Stat., page 113.

The constitution of the State of Ohio contains this language: "No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

This is held to be a reservation over the rates of a railroad company, formed by the consolidation of two companies, one of which had the express authority to fix its fares; the consolidation act provided that the consolidated

company should have the powers of both the original companies. It was contended that a subsequent law fixing the fares at three cents per mile, violated the charter.

The court hold the contrary, and say: "The Act of 1873, in the particular question, was a legitimate exercise of the reserve power of alteration, and was therefore valid." And further say: "It is urged that the franchise here in question was property held by a vested right, and that its sanctity as such could not be thus invaded. The answer is *consensus facit jus*. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is therefore no ground for just complaint against the State."

Shields vs. Ohio, 95 U. S. 319, page 324.

The corporation law of Massachusetts contained this provision: "Provided always that the Legislature may from time to time, upon due notice to any coporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

Under this reservation this court say that the Legislature of Massachusetts had reserved complete power to pass any law it might seem fit, which might affect the powers of the said corporation.

Beer Co. vs. Mass., 97 U. S. 25, page 32.

In a case where by agreement between the city and a R. R. Co. the latter was to pay three-fifths of the costs of a viaduct, and by a subsequent act of the Legislature it was required to keep the same in repair, entirely at its

own expense, this clause of the Federal Constitution, it was held, could not be successfully invoked.

Chi. R. R. Co. vs. Nebraska, 170 U. S. 57.

In that case the court say: "No doubt the agreement of 1886 constituted a contract in such a sense that the respective parties thereto continue to be bound by its provisions so long as the legislation, by virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation? Usually where a contract, not contrary to public policy, has been entered into between the parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution cannot in every case be successfully invoked. The presumption is that when such contracts are entered into, it is with the knowledge that parties cannot by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature."

Chi., etc., R. R. vs. Nebraska, 170 U. S. 57, page 71.

It is to be remembered that in this case there was no reserved power of control.

When the control exercised comes strictly within the exercise of the "police power," no reservation is necessary. In such case the corporation may be regulated, without any reservation.

R. R. Co. vs. Jacksonville, 67 Ill. 37.

A case which seems to us directly in point, is that of Spring Valley Water Works vs. Schottler, decided by this court. The law in force at the time of incorporation reposed the authority to fix the water rates in a Board of Commissioners, two to be selected by the Water Company and two by the City, and in case of disagreement, the four should choose a fifth. By subsequent law the authority to fix the rates was reposed entirely in the public authorities. Held that under the reserved power the State had saved its power of control and that the changes in question did not violate the obligations of a contract.

Spring Valley Water Works vs. Schottler, 110 U. S. 347.

The construction of what control was reversed by said Section 9, and what authority the law gave to contract, is to be considered in the light of the following principles, viz.:

Under the common law this corporation was under a duty to furnish water to all who should apply, at reasonable rates, and on equal terms.

Wagner vs. Rock Island, 146 Ill. 139.

It will not be presumed that the Statutes of 1872 intended to release it from that duty.

Ruggles vs. P. 91 Ill. 256;
A. & P. R. R. vs. U. S. 76 Fed. 186.

Public grants susceptible of two constructions must receive the one most favorable to the public.

Hamilton Gas Lt. Co. vs. Hamilton, 148 U. S. 258, page 268.

To effect an exemption from the operation of the Statute of 1891, it must appear that the power to make the contract in question as claimed is so clearly and unmistakably conferred that the language of the grant (that is, the Statutes of 1872) cannot be reasonably construed consistently with the reservation of the power by the State.

Ga. Banking Co. vs. Smith, 128 U. S. 174, page 182.

Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way.

Ruggles vs. Ill., 108 U. S. 526, page 531.

IV.

Does the Act of 1891 violate any of the terms of the XIVth Amendment.

The fixing of rates which are *prima facie* merely, and not absolute, under a law which does not deny relief in the courts, does not deprive plaintiff of its property without due process of law.

Reagan vs. Loan & Trust Co. 154 U. S. 362;
C. B. & Q. R. R. vs. Jones, 149 Ill. 361.

No complaint is here made as to the manner in which

the rates in question were fixed, and the demurrer admits that they are reasonable and just. If the right to regulate exists, plaintiff's property is not taken.

San Diego Land Co. vs. Natl. City, 174 U. S. 739.

It is not objectionable because by its terms the City Council is to fix the price for the supply to the City itself.

Spring Valley W. W. Co. vs. Schottler, 110 U. S. 347, page 353;

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, page 169.

What power the courts have to review and make a new schedule of rates, under the latter clause of this Act of 1891, is not necessary to decide.

The remainder of the Act could stand, nevertheless. The errors assigned here do not raise the question, and if they did, the separation between the three departments of government, is a local and not a Federal question.

ARGUMENT.

MAY IT PLEASE THE COURT:

Counsel are not insensible to the great amount of work cast upon a court in reviewing such a case as the one at bar, and very often unnecessarily. We have endeavored in our statement and brief to bring before the court clearly our understanding of the issues involved, and to define them as sharply as possible. In our citation of authorities we have not sought to exhaust all the cases to be found on any one point, nor to present every point that could be suggested, but rather to confine ourselves to the presentation of a few vital points upon which, it seems to us, the merits of this case turn.

We feel that this court, with the briefs of able counsel before it in the case of Rogers Park Water Co. vs. Fergus, and in the case of Freeport Water Co. vs. City of Freeport will have no difficulty in arriving at the correct conclusion as to the full force and scope of the statute in question, known as the Act of 1891. The Rogers Park case involves the question pure and simple of the right to regulate rates to private consumers. The Freeport case, like tho one at bar, involves the question of the right to regulate such rates as between the city and the company, for hydrant rentals.

As shown in our statement of the case, one hundred and fifteen hydrants were rented in this case before the Act of 1891 went into effect, which was July 1st, 1891, and the remaining forty-three were rented thereafter. As to the latter hydrants it seems to us so clear that the Act cannot be held unconstitutional, that we need do no more than

call attention to the fact that these hydrants were rented after the Act went into effect, and hence the obligations of the contracts for their rental are to be measured by that Act itself.

The original ordinance professes to fix a price for future hydrants, but does not obligate the city to take any more than one hundred. Each time a subsequent hydrant was taken, an ordinance was passed specifying its location, fixing the price, the term, and containing an agreement on the part of the city to pay.

The controversy is over the one hundred and fifteen rented before the Act of 1891 was passed, and as to the effect of this Act upon the prior ordinances.

This Act is a complete justification for the ordinance known as No. 517, and unless the Act falls, the ordinance must stand.

The contention of the other side is that the ordinances passed prior to the time this Act took effect, fixed rates unalterable for thirty years. This position necessarily assumes two premises, viz: 1st, that the proper construction of the language of the two Acts of 1872 is, that they professed to give authority to bind the city in that regard. 2nd, that by such statutes the Legislature lawfully delegated to the city such power to contract, that the State was unable thereafter to exercise its legislative power to enact this statute so as to apply to this case.

In our brief it seemed most logical to divide the authorities under several heads or groups, and in this argument it is probably best to pursue the same line of division.

I.

The law of 1872 did not warrant a contract fixing a price for thirty years.

The two Statutes of April 9th and 10th, 1872, are to be construed in *pari materia*. Counsel for the other side substantially so admit.

The first Statute is entirely silent on the subject of rates. When adopted it was entirely inapplicable to *persons*. The word *persons* first appeared by amendment in 1885. The second Statute is also lacking in express power to fix rates for the full term of thirty years.

The grammatical construction of the last phrase "*and for a period not exceeding thirty years*," is, as our court holds, that said phrase modifies the words *construct and maintain*, and not the words *at such rates as may be fixed by ordinance*.

This construction is practically admitted by the other side when they contend that express power is given to provide the supply, and this *implies* the power to contract for a long term as a necessary incident.

The cases, it must be admitted, are not harmonious on the question of whether a city can make a contract for thirty years, in the absence of direct authority expressly stated. In other words, whether the element of time, if the price is fixed for thirty years, does not make the contract unreasonable. The statutes of the different States vary so much in phraseology that the weight of any case as authority in the case at bar is sometimes hard to determine.

The cases are by no means all one way that such contracts are good.

We cite considerable respectable authority to the con-

trary, and as we confidently believe when those cases cited on the other side which are inapplicable, and those which are based on statutes so different from ours as to be of no controlling weight, and those which are based on reasons not found here, are winnowed out, our court will not be convicted of following the wrong lead. We cannot call attention to every case cited on the other side. As already said there are a few cases where the holding is that where a power to contract is given, silent on the point of time, that a long time contract, as for instance in Indiana, a gas contract for twenty years, is upheld. The principal reason given in those cases is that no company would consent to build a plant unless a contract for such a length of time were given. That reason would not be of controlling effect in the case at bar, for under our construction of the law, the city became bound to take the supply for thirty years, at such prices as should always be a reasonable compensation for the service rendered. As an inducement to the building of the plant, the company had the assurance that it should furnish a certain supply at reasonable prices. That is a greater assurance than a railroad or a street car line have, when they incorporate or take a grant from a city. The same reason which holds that a water company would not invest its money except upon an assurance of a definite price for its service, would hold that a railroad company would not incorporate and build its line unless there was a guaranty that its franchise should be exclusive, or that its fares should never be reduced below a certain rate. Railroad companies, street car companies, telephone and other companies whose business is impressed with a public interest, and as such is subject to regulation on the subject of rates, do not demand and do not receive such assurances, as water companies say they must have.

Again, the cases that so hold are at variance with the rules of construction applicable to such grants, viz., that every reasonable doubt of the existence of the power should be determined in favor of the public.

The public policy of the State of Illinois is clearly indicated by the East St. Louis gas litigation.

The Supreme Court, while holding the city liable on the ground, among others, that so far as the contract was executed and the city had received the gas under it without objection and without notice that it would no longer be be bound to the contract, very clearly held that so far as it was executory it was objectionable on account of the length of time for which it ran, viz., thirty years. (98 Ill. 415, East St. Louis vs. Gas Co.) The city thereupon gave notice of its intention to terminate the contract. The company brought suit and was defeated.

19 Ill. App. 44, and 47 Ill. App. 411.) (same parties

These decisions made in another case than the one at bar, as well as others made in cases of a school teacher, and keeper of a poor farm indicate that in Illinois, whatever the rule may be elsewhere, municipal corporations are held to a strict limit of the powers conferred.

It will be noticed that the decision in the 98th Ill. 415, was filed Feb. 3, 1881, more than a year prior to the passage of the first ordinance in this case.

Another fact that is noteworthy as to their cases is that in nearly every one of them the contract is adjudged to be just and reasonable. In some of the cases at least, evidence was heard from which the question of reasonableness was determined. In that respect they differ from the the case at bar, where it is confessed that the rate was originally too high, and even then exceeded a just compen-

sation for the service rendered. The admission of this fact by the demurrer is not inadvertant. Our State Supreme Court held the pleas good, and sent the case back to the trial court, where an ample opportunity was afforded to traverse the pleas, if untrue. But plaintiff declined that issue.

We submit that no case can be found in the books anywhere which bound the city under an implied power, to a contract for thirty years, confessed to be unreasonable in the prices fixed.

The reasons assigned by our Supreme Court for holding that the proper construction of the language of these two acts did not warrant a contract for a fixed price for thirty years, simply considering them as standing by themselves, and unaffected by the limitations of the constitution and the corporation act, need not be set forth here at large. The opinion speaks for itself.

These limitations will be discussed under the next two heads.

II.

To construe these Statutes of 1872 as authorizing a contract for a fixed rate for thirty years, which would prevent the passage of the Act of 1891, as to the case at bar, would violate the State Constitution.

The authorities are somewhat in conflict on the point as to whether, in passing such ordinances as are set out in the declaration, the City acts in a legislative capacity, or in an individual business capacity, but however that may be, the logical sequence in the case at bar is this:

If the position of plaintiff in error is true, then the City

of Danville has by its contract limited the legislative power of the State—a thing which the State Legislature itself could not do.

Let us state the following propositions:

A. In the first instance the Legislature has the right to regulate water rates, and this right is governmental or legislative in its nature.

B. It may confer that power on the City.

C. Or it may confer power on water companies to fix their own rates.

D. But the Legislature in all its acts is ever subject to the constitutional limitation, that no law "*making any irrevocable grant of special privileges or immunities shall ever be passed.*"

Sec. 14, Art. 2, Const. Illinois.

The law places a duty upon every person or corporation engaged in the business, to furnish water at reasonable rates, and authorizes the Legislature to pass laws to enforce that duty.

Under the construction of plaintiff in error, it is removed or excused from this duty, and from the power of the Legislature to coerce the performance of that duty. An unreasonable rate has been originally fixed, and it claims immunity by reason of an alleged contract with the city.

Under the constitution of the State of Illinois, no such immunity is possible. No contract can be made which deprives the State of its powers in the premises, to legislate, as may be needed, on the subject of water rates.

The power of the State over water companies is not absolute, but it does extend under the constitution and under the reserved power of Sec. 9 of the Corporation Act,

to the passage of any law on the subject of water rates, the purpose of which is to prevent extortion.

Suppose for the sake of argument that on Nov. 11th, 1882. (the date of the first ordinance.) the Legislature had passed a law to the effect that all water companies in the State should have and receive $75 per annum as a rental for all hydrants furnished to cities, for a period of thirty years thereafter.

And suppose for the sake of argument that relying on the improbability or impossibility of a change in such legislation the Danville Water Company had built its works and put in one hundred hydrants for the City of Danville.

And suppose further for the sake of the argument that afterwards on June 6th. 1891, the State Legislature had enacted that all persons or corporations furnishing water should do so at rates to be fixed by the municipal authorities in the city in which such water works were located, such rates to be just and reasonable.

Could it be contended for a moment that the Legislature was powerless to adopt the second law by reason of the former law?

No distinction can be made on account of the fact that in this case the rates were fixed by the ordinances of the city accepted by the company instead of by an Act of the Legislature. That fact does not change the effect of the legal principles announced in the cases we have cited. In view of the constitutional limitation the city could exercise no higher power than the Legislature. The legislative power of the State could not be bartered away by anyone.

Neither can any distinction be made by virtue of the

fact that in said cases the right granted was to the company to fix its own fares. That right is as valuable as the right to receive a certain fixed amount. If the obligation of contract rights is found to exist, such contracts cannot be varied in the slightest degree without the consent of both parties.

The authorities are also in conflict as to whether or not the Legislature when it passes a law regulating tolls in cases of those engaged in a public business, has authority in the premises by virtue of the "police power." It must be confessed, we think, that the decisions of this court are not altogether harmonious. But it is needless to stop to discuss the limits of the "*police power.*"

We have not taken the time to cite the cases which hold that this right to regulate tolls is by virtue of the "*police power.*" It is sufficient for the purposes of this case to know that such power to regulate exists, by whatever name it may be called. The doctrine is now too well settled to admit of dispute, that such a power of control lies in the State, and that the doctrine applies to the rates of a water company. The doctrine is also well settled that such power is legislative in its nature, and that the seat of such authority to so regulate the business, is primarily in the Legislature of the State.

As already stated, in the State of Illinois the Legislature is subjected to a limitation which prevents it from parting with its control over water rates.

The common law abridges the right of any individual or corporation engaging in a quasi-public business, to fix its tolls according to his own will. The right to carry on the business of supplying water to a city or its inhabitants

does not exist by common right. It is a matter of grant or privilege from the public or from the government. The person who takes such a grant or privilege, does so with the duty attached that he must serve all who apply, on equal terms and at reasonable rates, and that the law-making power may pass Statutes regulating tolls. This court has held, notably in the two cases of New Orleans Water Co. vs. Rivers, 115 U. S. 674, and St. Tammany vs. New Orleans Water Co., 120 U. S. 64, that the Legislature, *in the absence of constitutional limitations*, may grant an exclusive privilege, which will pass beyond its power to repeal or modify. But these holdings are expressly limited to those cases where the Legislature itself is unhampered.

In the State of Illinois, improvident grants, especially to corporations, had been made by the Legislature, to railroad and other companies, by which it seemed that the power to regulate the tolls of such grantees had been lost to the State. Accordingly, when the new Constitution was framed in 1870, a safeguard was inserted which was intended to be a check on that point, upon the power of the Legislature. That such was its purpose is plain from its provisions as well as from a reading of the debates upon the adoption of the section in the convention, and also from a knowledge of the history of the State and its laws.

To now hold that the city under a power from the Legislature could estop the State from legislating on the subject, would violate the limitation placed on the Legislature itself by the constitution. It is self-evident that the limitation on the Legislature is binding upon its creature, the City.

Would it be contended that under the constitution of

1870, the Legislature of Illinois might enact that all railroad companies hereafter formed may collect toll for carriage of passengers at the rate of three cents per mile, which rate shall never be reduced during the life time of the franchise of the grantee, or even say, not within thirty years? And that such legislation would stand as against a subsequent Act of the Legislature authorizing such rates to be fixed by a Railroad Commission?

The same inhibition applies to water rates as to railroad fares.

This power of the State cannot under our constitution be lost.

The Legislature of the State of Illinois could not give plaintiff a charter which would exempt it from future legislation on the subject of water rates. How then can it give the city and company power to so contract as to accomplish that purpose?

The case of Shields vs. Ohio is in point. In its facts it is as follows: Two railroad companies, one of which under its charter possessed the express power to fix its own fares, were consolidated on June 15th, 1853, by virtue of a General Act passed March 3d, 1851, which declared that such consolidated company should have all the powers conferred upon the original companies. The new constitution of Ohio took effect Sept. 1st, 1851. It declared that "*no special privileges shall ever be granted that may not be altered, revoked or repealed by the General Assembly.*" It also contained a clause giving the Legislature the right to alter or repeal all laws governing corporations.

The court in its opinion quote the language we have above quoted, and say that this limitation reserved to

the State the right to fix the fares at three cents per mile, by the Act of 1873.

Shields vs. Ohio, 95 U. S. 319

The authority and soundness of doctrine of this case has never been doubted by the court.

The power conferred by the Statutes of 1872 must be determined in the light of the authorities, that a grant which will impair the legislative power of the State, is never presumed. Such a grant must appear from language which is clear and unequivocal. And of course such grant cannot exist counter to a limitation on the Legislature.

Kindred to this question, is the one we discuss under the next sub-head, viz: As to the reserve power over this plaintiff and all other similar corporations under Sec. 9 of the Corporation Act.

The control reserved by the constitution is over persons and corporations, while that of Sec. 9 is only over the business of the latter.

III.

Under Sec. 9 of the Corporation Act, the State reserved the right to pass such provisions and regulations as are contained in the Act of 1891.

The exact language of this reservation is: "The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations shall be binding on any and all corporations formed under the provisions of this Act." (1 Starr & Curtis Stat. page 1006.)

The effect of such a reservation is that the plaintiff when it took its charter under the laws of the State, contracted with the State that the State should have power

to prescribe such regulations and provisions as it, the State, might deem advisable. Having contracted to that effect it cannot be heard to say that a subsequent law exercising the reserved power, violates the obligation of the contract, for exactly the reverse is true. The legislation is in accordance with the contract.

The power to regulate is not a power to destroy, and in the case at bar it has not been attempted either by the Act of 1891, or Ordinance No. 517, to so exercise it.

If this power to regulate tolls is not reserved by this provision, pray tell, what is reserved?

A reservation is not necessary to enable the State to pass subsequent laws under the "*police power*" strictly speaking. For instance, in two of the cases we cite from this court, it is held that the amount of street paving which can be required of a street car company can be increased. And that a R. R. Co. which by agreement with the city built a viaduct, three-fifths of the cost of building and repairing which it was to bear, and no more, cannot insist on the contract as against subsequent legislation imposing on it the burden of the whole cost of maintaining and repairing. These burdens the law imposes under the "*police power*" and independent of the "*reserved power.*"

The right to regulate charges is close kin, at least, to this branch of the "*police power.*"

It is a right of great importance to the public, and any claim to exemption or immunity from legislative control over the tolls of such a corporation, should never be implied, as Judge Harlan says, in delivering the opinion in Covington, etc., Turnpike Co. vs. Sandford, 164 U. S. 578, page 587: "It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation."

No more important regulation could be thought of, as necessary for the State to reserve, than the right to supervise the charges of such a corporation as this. The provision for a water supply and the prevention of extortionate charges for the water supplied is a matter of great public concern. If a city may bind itself to pay extortionate prices, it may soon disable itself, in view of the well known limitations upon the debt creating power of cities in our State, from performing its necessary functions. The matter of an adequate supply of fire hydrants is a necessity for the protection of the public against the calamities of fire.

The same construction which the plaintiff in this case puts upon its alleged contracts under the laws of 1872, would prevent the Legislature from enacting the Law of 1891, as governing rates for water furnished to private consumers. That is the question involved in the Rogers Park case. Their construction is that the Act of April 10th, 1872, authorized all rates to be fixed for thirty years, unalterably. The Statute seems to make no distinction between public and private rates.

A case directly in point on this branch of the case is Spring Valley Water Works vs. Schottler, 110 U. S. 347. This case was of controlling weight in the decision of our Supreme Court, and as we view it, must also be, in this court. The Constitution of California delares that the use of water appropriated for sale, rental or distribution, is a public use, and subject to regulation and control by the State, and also provides that the rates in cities should be fixed annually by the city council.

The constitution took effect January 1st, 1880. The Spring Valley Water Works Company was incorporated June 19th, 1858, under a law which designated that water

rates should be fixed by a commission, two selected by the company, two by the city, and in case of disagreement the four to choose a fifth. At that time there existed a reserve power to alter or repeal all laws passed as to corporations.

It was held that the provisions of the constitution of 1879, did not violate the obligations of a contract, and that the provision for the fixing of rates was indissolubly connected with the reserved power.

Spring Valley Water Works vs. Schottler, 110 U. S. 347.

The provisions of Sec. 14, Art. 2, Constitution of Illinois, and Sec. 9 of the Corporation Act, warrant a change of rates under the reserved power of regulation, and that being true no distinction can be made between the case cited and the one at bar.

We have found no case in the books anywhere authorizing such a contract as the plaintiff claims, where a reserve power over corporations was kept by the State, and where the Legislature was forbidden to give irrevocable special privileges or immunities.

IV.

Do Ordinance No. 517, and the Statute of 1891, violate the terms of the XIVth Amendment?

It seems to us this point is not fairly within the issues. The only property which plaintiff could claim to have lost by virtue of the ordinance in question, would be the benefits of its alleged contracts. The prohibition of Section 10 of Article 1, of the Federal Constitution, reaches that point directly. If the obligation of the contract is impaired, that is the end of the whole matter. In such case there

is no need to seek for an indirect prohibition. If the obligation of the contract is not impaired, for the reason that its obligation was not so broad as claimed, then we fail to see how the XIVth Amendment can save it.

The effect of this Act of 1891, was to vest in the City Council a legislative power to regulate water rates, which in the absence of a contract prohibiting it, was clearly proper. The City Council was certainly a proper tribunal in which to repose the power.

No attack is made on the manner in which the City Council in this case exercised its power. It is not claimed that the Council acted improperly or corruptly. It was not for this Act to point out the proceedure to govern the Council in its determination of what rates were reasonable. The Council was a legislative body, and was not bound to proceed to a hearing as in cases in court.

The attack is directed solely against the power of the city to pass the ordinance. We think no other question arises on this record, and the only reason that can be alleged against the right to pass the ordinance is a pre-existing contract, the obligations of which it is alleged to impair.

The power of review sought to be given by this statute to the courts, to the extent of enabling such courts to modify and establish a new schedule of rates, in case the city shall fix the same too low, received no attention in the court below. If the provision in question is unconstitutional as attempting to confer legislative powers on a court, that question arises solely under the State Constitution, which divides all governmental power into the three distinct branches. In that respect it is not in violation of the Federal Constitution, and the State Court will no

doubt solve that question correctly when it is presented to them.

The effect of the statute is merely to make the action of the council in establishing rates *prima facie* evidence of the justness thereof. This is similar in effect to the establishment of rates by a Railroad or Warehouse Commission, and as we understand the holdings of this court, that clearly is unobjectionable.

V.

Under the four sub-heads above we have sought to discuss what seemed to us the leading issues of law in the case. Now with a few remarks of a more general nature we submit the case.

The construction put by our court upon the Acts of 1872, would undoubtedly sustain Ordinance No. 517, without any reference to the Act of 1891. The construction is that the former Acts did not contemplate the fixing of rates for the full term in advance, but that the regulation should be by ordinances passed from time to time. In this view, the validity of Ordinance No. 517 does not depend solely upon the Statute of 1891, for the ordinance might have been passed without regard to the new Statute.

In that view no Federal question would have been involved, and we might have asked this court to affirm because no jurisdiction appears here. It is, however, true that the State Court did hold directly that the Act of 1891 was constitutional and valid, and we have preferred to meet the question squarely upon its merits. If this court should conclude it had no jurisdiction it could of course dismiss the suit of its own motion. But we believe the merits to be with the defendant in error, and desire a decision thereon.

If it were not for the fact that the Statute of 1891 is drawn in question, the construction of the Supreme Court of the State on the meaning of the Acts of 1872 would be conclusive, and no Federal question would be involved.

The construction put by the State court upon this Statute of 1872 is in harmony with the prior construction put upon similar contracts, especially the East St. Louis gas contract, and is in harmony with the general policy that all such grants shall be strictly construed. In some States the construction placed by the decisions upon such contracts, is more liberal. Whenever a question arises for the first time in any State, its courts must determine in case of a conflict of authorities which line they will follow. Such decisions become a part of the public policy of the State. And while we do not deny the proposition that when a case comes before this court involving a question as to the impairment of the obligations of a contract, this court has the right to construe the contract for itself, yet in doing so the court ought not to coerce a State to accept a line of decisions, which seem to the courts of that State contrary to its public policy.

This is not a case where the decisions of a State court have once established the construction of a Statute, and contract rights have vested in consequence, and where afterwards the courts have reversed their former decisions. In the case at bar the construction of the Statutes of 1872 came before the Supreme Court of the State of Illinois, for the first time. They had not been drawn in question in any decision before then, except in the Carlyle case, 52 Ill. App. 577.

But the validity of a thirty year contract for gas had been drawn in question and held adversely.

The minority opinion in the State Court recognize this

as the law in case of a gas contract. The main difference between the majority and minority was as to the degree of strictness to be applied in construing these two acts.

Judge Dillon, speaking of this rule of a strict construction of the powers of municipal corporations, says: "The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." 1 Dillon Mun. Corp. Sec. 457.

The construction which the State Supreme Court has put upon the law of the State of Illinois is an eminently just one to the people. The Water Company is not denied a just and full compensation for its service. What that compensation shall include has been settled in similar cases by this court, notably the case of Smyth vs. Ames, 169 U. S. 466.

On the other hand, the Water Company is entitled to its franchises and privileges, including the right to carry on its business, use the public streets to lay its pipes, to furnish to the city the supply of water to the hydrants called for by the respective ordinances, and to receive and collect therefore tolls and rates which shall always be just and fair and reasonable.

It may be that the contract was not as advantageous to the company as it thought when it accepted the same.

As this court says: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and National legislation."

Hamilton Gas Light Co. vs. Hamilton, 146 U. S. 258, page 268.

We confidently believe that the decision below was strictly in accordance with the laws of the State of Illinois, and that such decision and such laws as were given effect thereby, do not violate any of the provisions of the Federal Constitution, or the XIVth Amendment.

We therefore ask an affirmance.

Respectfully submitted,

G. F. Rearick.

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